No. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR RESPONDENT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On April 10, 1978, Bonnie Cramer, a social worker with the Durham County, North Carolina, Department of Social Services, Respondent, filed a Petition in the Juvenile Court seeking the termination of parental rights of Abby Gail Lassiter to the minor, William L. Lassiter. This Petition, along with a Summons, was served on Ms. Lassiter, personally, in Women's Prison, Raleigh, North Carolina on April 12, 1978. She made no response within the time prescribed in the Summons, and as

a result of this default, the Petition was set for evidentiary hearing as required by N.C.G.S. §7A-289.28 for June 13, 1978. Ms. Lassiter was served with a Notice of this hearing by registered mail on May 28, 1978. Because this hearing date conflicted with a statewide judicial conference, it was rescheduled for August 31, 1978, notice of which was served on Ms. Lassiter by registered mail on August 11, 1978. (Joint Appendix, 16).

Prior to the August 31, 1978 hearing, the attorney for the department requested that the presiding Judge call officials at Women's Prison in Raleigh, and direct that Ms. Lassiter be brought to Durham for the hearing. (Joint Appendix, 21). As a result of the Notice of Hearing and the request of counsel for the department, Ms. Lassiter was brought in custody from the Women's Prison to the hearing. (Joint Appendix, 18).

Prior to the taking of testimony, the Trial Judge inquired of Ms. Lassiter as to whether or not she was going to have an attorney. Ms. Lassiter made, in effect, a motion to continue the hearing, stating that she would like more time to talk with her lawyer. The Court noted that she had been served properly with the Summons and Petition, had failed to respond as directed by the Summons, had been served with Notice of Hearing on the Petition two separate times, and had conferred with an attorney with respect to her criminal conviction. However, she had not, mentioned to her attorney that this action had been brought against her or that the hearing had been scheduled. In view of these circumstances, the Court concluded that Ms. Lassiter had had ample opportunity to seek legal counseling and ordered that the hearing proceed. (Joint Appendix, 16). At no time during the entire hearing did Ms. Lassiter ever inform the Court that she could not afford counsel, nor did she ever explicitly or implicitly ask that he appoint an attorney to represent her. (Joint Appendix, 16). (In fact, the first occasion the Trial Judge had to consider Ms. Lassiter's indigency was on the 21st day of November, 1978 when she, through counsel, filed an Affidavit of Indigency asking the Court to allow her to prosecute her appeal *in forma pauperis*. Even then, there was no request for the Court to appoint an attorney to assist her in perfecting her appeal. [Joint Appendix, 13]).

The evidence adduced at the hearing from the social worker, the Petitioner, and Petitioner's mother substantially proved the allegations in the Petition and the Court entered an Order terminating the parental rights of Petitioner as being in the best interests of the minor.

Petitioner immediately thereafter contacted the North Central Legal Assistance Program in Durham, and the attorneys in that agency perfected her appeal, assigning as the sole Assignment of Error the failure of the Trial Judge to appoint an attorney to represent her. (Joint Appendix, 15). The question presented to the North Carolina Court of Appeals was whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution required that the Trial Judge appoint an attorney to represent her at state expense and without legislative authorization, before proceeding with a hearing on the Petition to terminate her parental rights. (Joint Appendix, 22).

The North Carolina Court of Appeals, in considering this sole question, followed the principles of due process previously outlined by this Court, and ruled that Ms. Lassiter had been given ample notice and opportunity to be heard and was not entitled to a Court appointed attorney at state expense absent legislative enactment authorizing such. *In the Matter of Lassiter,* 43 N.C. App. 525, 259 S.E. 2d. 336 (1979). (Joint Appendix, 21-23). On January 17, 1980, the North Carolina Supreme Court, without opinion, denied her Petition for Discretionary Review, *In the Matter of Lassiter,* 299 N.C. 120, 262 S.E. 2d. 6 (1980). (Joint Appendix, 28).

Thereafter, Ms. Lassiter petitioned this Court for a Writ of Certiorari to review the decision of the North Carolina Court of Appeals. The writ was granted on October 6, 1980. (Joint Appendix, 31).

SUMMARY OF THE ARGUMENT

The writ of certiorari was granted to review a constitutional question that was not raised properly in the Trial Court. Petitioner assigned as error to the North Carolina Court of Appeals the Trial Court's failure to appoint an attorney to represent her because she was indigent. At no time during the trial proceedings, however, did the Petitioner raise the question of appointment of counsel or offer evidence of her indigency. In fact, she focused the court's attention away from consideration of those factors, by requesting a delay in the proceedings to confer with her attorney who was representing her in a proceeding for post-conviction relief after her conviction for second degree murder. Once the Trial Judge learned that she had failed even to mention the instant proceeding to the attorney, though she had been conferring with him over the preceeding four months, he denied her request for a delay. The writ should be dismissed as having been granted improvidently because of the Petitioner's failure to raise properly the constitutional question in the Trial Court.

The Court "has looked to the fundamental nature of the original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States." *Gideon v. Wainwright,* 372 U.S. 335 (1963). Virtually every right specifically enumerated in the Bill of Rights has been found so to be. Additionally, many other rights not specifically spelled out have been deemed fundamental as falling within the "penumbras" of, or "emanations" from, guarantees in the Bill of Rights. *Griswold v. Connecticut,* 381 U.S. 479 (1964). Clearly, elements of marriage, family, and the parent-child relationship are considered to be in this category.

The right to counsel in a criminal action is fundamental, *Powell v. Alabama,* 287 U.S. 45 (1932). The logical extension of that right requires the appointment of counsel for the indigent in a criminal proceeding to overcome the inherent imbalance of resources between the State and the individual in a criminal action and allows the Defendant to stand equal before the law. *Gideon v. Wainwright, supra,* at 344. The right to counsel is fundamental in a criminal action specifically because it has been

spelled out in the constitution. The Court has been very careful to avoid extending the right to appointed counsel to cases not infringing on the individual's own personal freedom. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). This present action does not, directly or indirectly, infringe on the Petitioner's own individual personal freedom and is, therefore, not an appropriate case for the extension of the right to court appointed counsel.

At a minimum, the Due Process Clause requires that an individual be given notice and an opportunity to be heard, *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950), at a "meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545 (1965). The many decisions of this Court defining the parameters of those terms have not extended their meaning to include appointment of counsel for the indigent in every action affecting a liberty or property interest, whether or not such interest be deemed fundamental. To require the appointment of counsel in this proceeding because Petitioner's interest in her child might be deemed fundamental would require the immediate extension of this right to the indigent in any action involving one of the many interest previously deemed fundamental by this Court. *See Boddie v. Connecticut,* 401 U.S. 371 (1971).

The fact that more than half of the states presently provide for appointed counsel in similar proceedings either by legislative enactment or decrees of lower court does not mean that appointment of counsel is *required* by the Due Process Clause of the Fourteenth Amendment. The creation and extension of such a right is within the legislative prerogative and should be left to the states. The North Carolina legislature has considered bills which would create such a right, but has been unwilling to adopt them. Still, the legislatures of North Carolina and the other states are the proper forum for consideration of this issue.

The tripartite balancing test enacted in *Mathews v. Eldridge,* 424 U.S. 319 (1976), has been offered by the Petitioner as the guide to be used by the Court in considering the merits of her claim. That balancing approach is inapposite to the case at bar, except by rather tenuous analogy. It was created over a long period of time by the Court in review of many administrative and *ex parte* quasi-judicial decisions that were challenged on Due

Process grounds because they affected adversely a liberty or property interest without giving the individual notice and opportunity to be heard. The present action was not an administrative or *ex parte* judicial decision. It was a judicial proceeding resulting in a termination of Petitioner's parental rights only after a full hearing at which she was present, testified, and cross-examined witnesses.

Even the application of the *Mathews* balancing principle does not require appointment of counsel in this case. The Petitioner's interest in her child, presumed to be fundamental while he was in her care, custody, and control, became qualified or conditional once he was removed from her custody because of neglect, *see, Morrissey v. Brewer,* 408 U.S. 471 (1972), and as a result of her total failure to indicate any meaningful concern or care for his welfare, devolved to a purely biological relationship devoid of any meaningful association with her child. *See Smith v. Organization of Foster Families,* 431 U.S. 816 (1977). That interest, when balanced against the interest of the child in a permanent plan of care separate and apart from her, becomes something less than fundamental and requires less Due Process protection.

There is little risk of erroneous termination of parental rights under the North Carolina statutory scheme. The statute strikes a balance between the interest of the child and his permanent plan of care in the majority of cases in which the parent expresses no interest, and those cases where the parents do express an interest. It is a judicial proceeding rather than an administrative one, requiring full notice and opportunity for hearing, and requiring a hearing on the merits of the Petition, even when the parent defaults. What little statistical information that exists indicates that in the vast majority of cases the assistance of a lawyer for the parent makes very little difference in the final outcome. Rights are terminated in approximately 95% of cases where the parent is represented. Petitioner's total lack of interest in her child is clear from a reading of the record, and the Trial Court's finding and conclusion that termination was in the best interest of the child have not been challenged on appeal.

The government's primary interest in these proceedings is to insure that those children needing permanent plans of care apart from their parents can realize that need with a minimum of difficulty, while allowing a full opportunity for those parents maintaining an interest in their children to make such interest known. While potential costs of appointed counsel in these proceedings are low by comparison to criminal actions, an extension of a right to appointed counsel to this family interest that necessarily would require extension of the right to an indigent in any other action involving a fundamental right, would be very expensive. Since there is some indication that the presence of an attorney makes very little differences in these proceedings, appointment of counsel would serve only to drive up administrative and judicial costs, while delaying for a considerable period of time the realization of the child's permanent plan of care. Thus, the present statutory scheme is a reasonable and rational effort to balance the interests of the child, the parent, and the government, while affording all interest parties due process.

The Due Process Clause of the Fourteenth Amendment requires that in an action affecting an individual's liberty or property interest other than his personal freedom from restraint, that he be given notice and an opportunity to be heard. There is no question that Petitioner was afforded this due process when she was served personally, and in spite of her failure to respond to the Petition, was present and testified at the hearing. The Constitution requires no more, and the lower court's decision to that effect should be affirmed.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS HAVING BEEN GRANTED IMPROVIDENTLY IN VIEW OF THE FACTUAL CIRCUMSTANCES OF THIS CASE.

The Petitioner, Ms. Lassiter, does not challenge that in this civil action, brought by the Durham County Department of Social Services (the Department), that she was afforded both notice and opportunity to be heard as required by the Due Pro-

cess Clause of the Fourteenth Amendment. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950); *Armstrong v. Manzo*, 380 U.S. 545 (1965). *See*, Joint Appendix 5-6, 16, 21-22; Brief for Petitioner 3. What she seeks, however, is to have the Court forge an additional procedural requirement out of the Due Process Clause: that of court-appointed counsel at state expense in an action not affecting her personal freedom. She does so on the theory that her right as the biological mother of William Lassiter is such a fundamental liberty interest (much more so than the other liberty interest identified by this Court in *Mullane* and *Armstrong* as being protected adequately by notice and opportunity to be heard), that in a civil action affecting that right, the trial court must appoint an attorney to represent her to ensure that this special liberty interest is protected. In this proceeding, the Trial Court was not presented with this theory, nor was it confronted with any request for appointed counsel or evidence of indigency.

At the outset of the hearing on August 31, 1978, the trial judge questioned Ms. Lassiter about representation by counsel. She, in effect, made a motion for the hearing to be delayed to allow an opportunity to talk with her attorney about this proceeding. In considering this request, the trial judge reviewed when Ms. Lassiter was served with the Summons and Petition, and discovered that she had been served more than four (4) months previous to the hearing. He also discovered that she had been served with two separate notices of hearing. Ms. Lassiter then informed him that she had been consulting with her attorney throughout that four-month period, but never had mentioned to him that she was involved in an action affecting the very heart of her relationship with her son. Considering this only in the context of her request for a delay, the judge, in his discretion, ruled that she had had ample time to seek counseling, especially when she had been conferring with an attorney throughout, and denied her request. Joint Appendix 16.

On appeal to the North Carolina Court of Appeals, Ms. Lassiter assigned, however, as her sole assignment of error, the judge's failure to *appoint* an attorney for her. Joint Appendix 15. There is nothing in the record before the Court to indicate

that this question was before the Trial Court. She never asked that he appoint a lawyer for her, nor did she at any time during the hearing inform the Court, or offer any evidence, that she was indigent. The question of whether he should assign counsel for her was not raised until she, in an Affidavit, asked the Trial Court to allow her to prosecute her appeal *in forma pauperis* on November 21, 1978, more than two months after the hearing. This was also the first time the court was informed of her indigency. Joint Appendix 13. Clearly, had she asked for appointed counsel and offered evidence of her indigency during the discussion regarding counsel and the Trial Court denied her request, (consistent with the North Carolina statutory scheme regarding appointment of counsel for indigents) then her question as to whether or not such appointment is required by the Fourteenth Amendment would have been raised properly.

In the hearing on August 31, 1978, the judge was led away from any question of appointment of counsel or determination of indigency by Ms. Lassiter's request for additional time to talk with her attorney, who was already conferring with her on another matter, and to whom she had failed to mention this action. This, coupled with the fact that she had been given notice of the proceeding and brought to the hearing, along with a total lack of legislative or binding case law authority to appoint counsel in this type of proceeding, prevented the constitutional question from being raised properly. At most, the judge may have erred by not allowing her request for a delay, but there was no exception taken to this possible error. Ms. Lassiter was in no way precluded from assigning this action as error to the Court of Appeals, but failure to do so constituted a waiver under the North Carolina Rules of Appellate Procedure.[1] The record to the North Carolina Court of Appeals, especially the Narrative of Testimony, Joint Appendix 16, provided ample opportunity to raise that question.

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[1]Rule 10 of the North Carolina Rules of Appellate Procedure, subsection (c) states: "The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exception . . . Exceptions not thus listed will be deemed abandoned."

Clearly, under this set of circumstances, before she could charge the judge with error in failing to appoint counsel, he should have been confronted with not only a request for such, but also given evidence that it was appropriate in Ms. Lassiter's situation because of her indigency. Her request, however, was for additional time to talk with her attorney about the pending matter. Mr. Loflin's Affidavit reflects that he would not have undertaken to represent her. Joint Appendix 11. Had she at least mentioned it to him however, she would have had a better basis for requesting a delay. Sheer speculation only allows for consideration of all the possible alternative events that may have occurred had she only mentioned the pending action and hearing to Mr. Loflin. The least he would have said is "I don't want to talk about that". He might have referred her to Legal Aid himself. He may have even informed her of "a constitutional right to appointed counsel" and instructed her to request counsel at the hearing. Any one of these different circumstances might have led to a more favorable consideration of her request for delay and allowed her time to go to Legal Aid. Nothing in the record indicates that the North Central Legal Assistance Program in Durham would have refused her representation at the hearing had they been asked. They immediately responded to her request for aid on appeal. It was Ms. Lassiter's total dereliction in failing to mention to Mr. Loflin in all her communication with him that this action was pending that the judge found to be "without just cause." Joint Appendix 6.

Under the circumstances as set forth above, the question of the court's error to appoint counsel as a requirement of Fourteenth Amendment Due Process was not raised properly and the writ of certiorari issued to review such error was therefore, improvidently granted and should be dismissed. Her failure to take exception to any other possible errors in her Record on Appeal, and assign them as errors to the North Carolina Court of Appeals, as provided for by the Rules of Appellate Procedure, is an adequate and independent state grounds for sustaining the court's termination of her rights.

II. WHETHER A RIGHT IS FUNDAMENTAL OR NOT IS NOT DETERMINATIVE OF WHETHER COUNSEL SHOULD BE APPOINTED AT STATE EXPENSE AS A REQUIREMENT OF FOURTEENTH AMENDMENT DUE PROCESS.

A. Those Rights Explicitly or Implicitly Guaranteed By The Constitution's Bill of Rights Are Fundamental And Therefore Binding on The States By Virtue of the Fourteenth Amendment.

Whether a right is to be considered fundamental is determined, not by balancing relative interests, but by whether it is explicitly or implicitly provided for in the Constitution. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 35 (1972). The rights guaranteed by the first eight Amendments to the Constitution are protected from unnecessary state infringment by the Due Process Clause of the Fourteenth Amendment. Mr. Justice Black, speaking for the Court in *Gideon v. Wainwright,* 372 U.S. 335 (1963) pointed out that:

> "In many cases . . . this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association and petition for redress of grievances." (citations omitted). *Id.,* at 341.

In *Griswold v. Connecticut,* 381 U.S. 479 (1964) the Court, per Mr. Justice Douglas, pointed out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance." *Id.,* at 484. It is in this fashion that the institutions of marriage and the family, not specifically mentioned in the Bill of Rights, have

sought, and found, protection under the Fourteenth Amendment[2] and though nowhere spelled out in the Bill of Rights, may ordinarily be considered fundamental. *Cf,* Part V, B-C, *infra,* (parent's interest may become qualified or conditional).

B. The Right To Appointed Counsel For The Indigent Is Required By The Due Process Clause Of The Fourteenth Amendment Only When The Liberty Interest Being Affected Is The Individual's Own Actual Physical Liberty.

The Sixth Amendment to the United States Constitution specifies that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In a series of cases beginning with *Powell v. Alabama,* 287 U.S. 45 (1932) this Court has held that the fundamental right guaranteed by this amendment to the criminal defendant is preserved to him in state prosecutions by the Due Process Clause of the Fourteenth Amendment. For the first time in that case, the Court imposed on the Trial Court the obligation to appoint counsel if the defendant could not afford to hire counsel. In *Powell,* the liberty interest was the right to life itself since the defendants had been sentenced to death, and the principle laid down in *Powell* was for years, held to apply only in capital cases.

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[2]*Griswold* dealt with the sanctity of the marital relationship. Earlier cases defined the parameters of the right of the parents to educate their children. *Pierce v. Society of Sister,* 268 U.S. 510 (1925), *Meyer v. Nebraska,* 262 U.S. 390 (1923). Others have recognized the need to insulate the family's right to indoctrinate children in a religion from unnecessary state control. *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). The right to have children, *Skinner v. Oklahoma,* 316 U.S. 535 (1942) and to keep them, *Stanley v. Illinois,* 405 U.S. 645 (1971) have also been guaranteed freedom from unnecessary state infringement. *Loving v. Virginia,* 388 U.S. 1 (1967) guaranteed the right of individuals to marry.

In later cases, the Court has been confronted with questions of whether sentences resulting from less than capital offenses required extension of the doctrine of *Powell. Betts v. Brady,* 316 U.S. 455 (1942), holding that the right to appointment of counsel is not fundamental, refused to do so. Twenty years later, the Court in *Gideon v. Wainwright,* 372 U.S. 335 (1962), overruled the holding of *Betts,* stating "that in our adversary system of criminal justice, *any person* haled into Court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.,* at 344, (emphasis mine). Finally, *Argersinger v. Hamlin,* 407 U.S. 25 (1972), while recognizing that *Powell* and *Gideon* involved felonies, held that the right to appointed counsel, firmly established in those cases, was applicable to any criminal prosecution where imprisonment could result. *Accord, Scott v. Illinois,* 440 U.S. 367 (1979). The Court refused to consider whether the Sixth Amendment would require appointment of counsel for crimes where the conviction would not result in imprisonment; saying:

> "How crimes should be classified is largely a state matter. The fact that traffic charges technically fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class where *imprisonment* actually occurs.
>
> "But in those that end up in the *actual deprivation* of a person's liberty, the accused will received the benefit of the 'guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Id.,* at 38-40 (emphasis added.)

No one would question seriously that in this line of cases, beginning with *Powell,* the liberty interest held to require the appointment of counsel as an element of Fourteenth Amendment Due Process is that highly personal freedom from physical restraint. Mere freedom from the negative aspects or stigma of a criminal conviction is not sufficient enough (though these can have a substantial impact on other types of liberty or property interest, *see Argersinger v. Hamlin, supra,* at 48, n. 11, (Concurring Opinion of Mr. Justice Powell), to warrant appointment of

counsel. It is the danger of the loss of one's personal freedom that triggers the due process protection of appointed counsel.

It is this sense of value with regard to one's personal freedom that has led to the extension of the right to appointed counsel to other actions affecting the individual's personal freedom. In *In re Gault,* 387 U.S. 1 (1967), the potential commitment of a juvenile delinquent to a state training school was the basis on which the court held that counsel must be appointed to the indigent juvenile in a delinquency proceeding. *Id.*, at 57. Similarly, it was the potential of commitment to an institution for an indeterminate term from one day to life that required appointed counsel in a hearing on such committment of a mentally ill sex-offender in *Specht v. Patterson,* 386 U.S. 605 (1967).

Important to this discussion of appointed counsel is the recognition that even in some cases involving deprivation of personal, individual liberty, this Court has refused to extend, wholesale, the idea that appointed counsel is always required by the Fourteenth Amendment. In *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), for instance, the Court held that appointment of counsel in a probation revocation hearing should be determined on a case by case basis, because the probationer's liberty had become conditional subsequent to his conviction. *See also Morrissey v. Brewer,* 408 U.S. 471 (1972).

The appointment of counsel in criminal actions at state expense is the logical extension of the guarantee of the right to counsel specified in the Sixth Amendment. The right to counsel is fundamental precisely because *it is* specifically spelled out. The right to appointed counsel for the indigent is guaranteed to minimize the imbalance of resources between the state and the individual inherent in a criminal proceeding. "That government hires lawyers to prosecute, and defendants who have the money hire lawyers to defend are the strongest indication of the widespread belief that lawyers *in criminal court* are necessities . . ." *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). (emphasis added). In holding that appointment of counsel for the indigent criminal defendant is required by the Constitution to

preserve to him this fundamental guarantee, and ensure that he "stands equal before the law" Mr. Justice Black stated:

> "Not only these precedents, but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one *charged with crime* to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.*, at 344, (emphasis added).

While the Court has moved away from strict labeling of actions as civil or criminal, its purpose in doing so is to reach to the heart of an action, and determine if appointment of counsel will benefit the individual who is subject to deprivation of actual liberty, not any other liberty interests. *See In re Gault, supra; Specht v. Patterson, supra.* Utilizing this process of analysis in examining this action to determine if appointment of counsel is required, the logical conclusion is that it is not.

Whether it be called civil or criminal, *see, In re Lassiter,* 43 N.C. App. 525, 259 S.E. 2d. 336 (1979); Joint Appendix 21-23, this action to terminate Ms. Lassiter's parental right to her son did not in any way pose a threat to her own individual personal liberty. The question of whether or not parents whose rights are sought to be terminated pursuant to N.C.G.S. §7A-289.32(2) because of neglect or abuse can thereafter be subject to criminal penalties is irrelevant in this case because the Petition brought against Ms. Lassiter did not contain such allegations of neglect or abuse.[3] Had such allegations been made against her, and as a

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[3]The bifurcation of North Carolina's proceedings in abuse, neglect, and dependency from those in termination of parental rights makes the prospect of criminal charges growing out of termination highly unlikely.

Reports of abuse or neglect must be made to and investigated by the Director of the Department of Social Services. G.S. § 7A-587 and 544. Based on that investigation, the Director may initiate custody (not ter-

result, she had been haled into Court to answer criminal charges of neglect or abuse pursuant to N.C.G.S. §14-316.1[4], -318.2[5],

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mination) proceedings. By virtue of G.S. § 7A-587 the parent would be represented in this proceeding. If the Director substantiates an abuse complaint, he must report it to the prosecutor, G.S. § 7A-548, who may initiate criminal charges. There is no requirement to report allegations of abuse or neglect in termination proceedings. If the Department obtains custody, the child is removed from the parents, which virtually eliminates the opportunity for further *physical* neglect or abuse, which is one of the grounds on which a termination proceeding may be based. G.S. § 7A-289.32(2). The Department cannot petition for termination unless it already has obtained custody through a proceeding wherein the parent (since January 1, 1980) has counsel. Ordinarily by the time the Department initiates the petition, this allegation carries less weight because the child has been removed from the parents in the previous proceeding.

Thus, criminal charges arising out of termination proceedings can only occur when the action is initiated by an individual, in which case Petitioner suggests counsel might not be required. Brief for Petitioner 50.

[4]G.S. § 14-316.1 states: *"Contributing to delinquency and neglect by parents and others.* Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. § 7A-517 shall be guilty of a misdemeanor."

[5]G.S. § 14-318.2 states: *"Child abuse a general misdemeanor.* — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physicial injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a)."

The cross referenced section reads: "every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both in the discretion of the court."

or -318.4[6] then counsel would have been appointed to represent her, because her personal liberty would have been jeopardized. (See Argersinger v. Hamlin, 407 U.S. 25 (1972). Questions, perhaps, of constitutional magnitude, as to the use of incriminating testimony elicited in a separate hearing, could then be raised.

C. In Any Action, Other Than One Affecting Individual Personal Liberty, Fourteenth Amendment Due Process Requires Only Notice And Opportunity For Hearing.

In other types of actions, (herein denominated "civil" because the interests affected are other than the individual's personal freedom), the procedures afforded require something else. The Court in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), considering the interest of the State of New York in employing judicial proceedings to settle trust accounts, laid down a principle of procedural due process that stands immutable today:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication

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[6]G.S. § 14-318.4 states: *"Child abuse a felony.* – (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or

(2) Bone fracture, or

(3) Substantial impairment of physical health, or

(4) Substantial impairment of function of any organ, limb, or appendage of such child,

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of a child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies."

be preceded by *notice and opportunity for hearing appropriate to the nature of the case.*" *Id.*, at 313 (emphasis added).

The Petitioner, in her brief, makes much of the Court's use of the language "appropriate to the nature of the case." Brief for Petitioner 9. The "notice" invalidated in *Mullane* was notice by publication, held insufficient because it did not name those affected by the action and because service by mail, or even personal service, could have been made on those individuals whose addresses were known. "Appropriate to the nature of the case" there meant such "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections." *Id.*, at 314. (citations omitted).

The Court in *Armstrong v. Manzo,* 380 U.S. 545 (1965) set forth the principle that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Ms. Lassiter seems to infer special meaning from these words, also. *See,* Brief for Petitioner 9. In *Armstrong,* the problem with the hearing was that it occurred *after* the entry of the adoption decree, thus unfairly shifting to Mr. Armstrong the burden of proof as to whether adoption of his child without his consent was appropriate under Texas law. The Court ruled that his objections to the adoption would have been more meaningful and appropriate if heard prior to the adoption, not after. *Armstrong v. Manzo, supra,* at 522.

What "appropriate to the nature of the case" and "meaningful time and in a meaningful manner" mean in terms of due process has been further defined by the Court. For example, *Goldberg v. Kelly,* 397 U.S. 254 (1970) requires an administrative hearing, replete with oral testimony, cross examination of witnesses, rules of evidence, and representation, if desired, by retained counsel, *before* welfare benefits can be terminated. The Court has specifically refused to say that counsel must be provided. *Id.*, at 270.

In *Stanley v. Illinois,* 405 U.S. 645 (1972), the Court invalidated an Illinois statute that allowed for the removal without any notice and hearing, of illegitimate childrem from

their unwed father because of an irrebuttable statutory presumption that unwed fathers are unfit to maintain custody of their children.

> "[A]s a matter of due process of law, Stanley was entitled to a *hearing* on his fitness as a parent *before* his children were taken from him . . .
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> * * * * *
>
> "Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him." *Id.*, at 649, 652-655, (emphasis added).

Boddie v. Connecticut, 401 U.S. 371 (1971) recognized and reiterated these principles of Fourteenth Amendment Due Process. The problem in *Boddie* was that the State's filing fee requirement in initiating a divorce action forced indigent individuals who could not afford to pay the filing fee, to remain married.

> "[W]e are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.
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> * * * * *
>
> "[W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the state's judicial machinery . . . [P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.*, at 376-377.

The result of *Boddie* was that the "meaningful opportunity to be heard" meant that the indigent seeking a divorce was given an opportunity to get into Court to be heard in the first instance, not that once he got there presentation of his claim would have been more meaningful if counsel was appointed to assist him. "[A] state may not, consistent with the obligations imposed on it

by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens *access* to the means it has prescribed for doing so." *Id.*, at 383, (emphasis added).

The Court's holding was a result of not only its recognition that "marriage involves interests of *basic importance* in our society" (emphasis added), but a recognition also that the judicial forum was the *only* means to legally dissolve it. Absent

If means alternative to a court hearing are available to resolve questions about liberty or property interests,[7] or if the right or interest claimed is less than fundamental,[8] then free access to court is not an absolute requirement.

Ms. Lassiter does not contest the fact that she was given ample notice of both the proceeding and the hearing , and through no expenditure of her own energies, was present at the hearing and afforded the opportunity to be heard. The procedural protections required by *Mullane, Armstrong, Stanley,* and *Boddie* were unquestionably present in this case. What Ms. Lassiter seeks to do is to append the application of one fundamental right; the right to counsel (including by the analogy to criminal cases, appointed counsel), to another; parental rights, by saying that because those rights also are fundamental, they are as deserving of the same protection in a proceeding to terminate them, as the individual's personal freedom at stake in the criminal proceeding. As indicated above, a fair reading of the Bill of Rights and those cases preserving the right therein guaranteed against unwarranted State intrusion do not allow latitude for such procedural due process bootstrapping.

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[7] *United States v. Kras,* 409 U.S. 434 (1973) held that a discharge in backruptcy "tough important . . . does not rise to the same constitutional level" as the interest in *Boddie,* and adjustments of debts could be made outside the judicial forum.

[8] In *Ortwein v. Schwab,* 410 U.S. 656 (1973) the Court held that welfare benefits have less constitutional significance, and do not require free access to court, especially where an administrative hearing as required by *Goldberg v. Kelly,* 397 U.S. 254 (1970), has been afforded.

III. A DECISION THAT REQUIRES APPOINTMENT OF COUNSEL HERE BECAUSE PETITIONER'S LIBERTY INTEREST IN HER CHILD IS FUNDAMENTAL WOULD REQUIRE APPOINTED COUNSEL FOR ANY INDIGENT FACED WITH DEPRIVATION OF A FUNDAMENTAL LIBERTY INTEREST.

The Court, as pointed out in *Gideon v. Wainwright,* 372 U.S. 335 (1963) "has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States." *Id.,* at 341. Those rights already placed in that category and "therefore made immune from state invasion by the Fourteenth . . . are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition of redress of grievances." *Id.,* at 341. Other liberty interest, as pointed out by Mr. Justice Douglas in *Griswold v. Connecticut,* 381 U.S. 479 (1965) though not specifically provided for in the Bill of Rights, are afforded protection under the Fourteenth Amendment, because they come within the "penumbras" of, or are "emanations" from, the Bill of Rights' guarantees. *Id.,* at 484. Virtually every aspect of marriage, family and parent-child relationships have, been deemed by this analysis, "fundamental" for the purpose of bringing them within the scope of the Due Process Clause of the Fourteenth Amendment. *See,* footnote 2, *supra.*

Ms. Lassiter would have the Court declare that because her right to her child is fundamental, counsel must be appointed to represent her, an indigent, in an action terminating that right. An indigent defendant in an action for libel or slander could assert the same claim. Surely an indigent defendant in a divorce action has a fundamental right not to be deprived unfairly of the marital relationship and could assert the same right to appointed counsel in a divorce action. Especially with regard to divorce actions, this result would be required by the language of *Boddie v. Connecticut, supra.*

> "[B]ecause resort to the state courts is the only avenue to dissolution of their marriages, [r]esort to the judicial

> process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court . . . In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum." *Id.*, at 377.

Petitioner argues that this result would not follow however, in civil actions where the fundamental liberty interest is being deprived by another individual, such as child custody disputes between two parents, (and presumably termination of parental rights actions initiated by one parent or other individual as provided for by N.C.G.S. §7A-289.24) as opposed to those initiated by some governmental entity. Brief for Petitioner 50. Ms. Lassiter states in her brief that "unlike child custody disputes, termination of parental rights cases are government initiated proceedings . . . *Id.* This clearly ignores the statutory section cited above. Surely, the indigent parent can derive little solace from the fact his rights are terminated by another individual rather than a governmental entity.

Further, Petitioner argues that most civil cases do not impinge upon such fundamental rights. Brief for Petitioner 50. However, every domestic relations action (divorce, action for child support, custody proceeding) involves a fundamental right as they have been defined by the Court, and in North Carolina alone, from July 1, 1978 until June 30, 1979 there were 54,063 domestic relations actions filed compared to only 46,397 other general civil actions.[9]

Petitioner finally argues that even in some civil actions that do implicate fundamental rights, such as child custody disputes between parents, the nuclear or extended family avoids total destruction because the child usually continues to live with one of the parents. Brief for Petitioner 50. It is hard to conceive that the loss to Mr. Armstrong of his child by adoption was any less significant because Mr. Manzo, her adopted father, happened

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[9]*North Carolina Courts, 1978-79 Annual Report of the Administrative Office of the Courts* 113.

to be married to his child's mother. *Armstrong v. Manzo,* 380 U.S. 545 (1965).

Thus far this discussion has focused on the indigent defendant faced with court action affecting a fundamental liberty interest. It is not inconceivable however, that following the import of *Boddie v. Connecticut, supra,* a plaintiff, seeking to vindicate a fundamental right would be entitled not only to proceed *in forma pauperis,* but also to court-appointed counsel. Surely, if the *Boddie* analysis would require free access to the only forum wherein one could be heard to adjust a fundamental relationship, Petitioner's analysis would require "the guiding hand of counsel" to ensure effective hearing. *Powell v. Alabama,* 287 U.S. 45 (1932). The same would be true with any indigent seeking to avoid deprivation or unnecessary infringement of any one of those fundamental liberty interests guaranteed by the Bill of Rights and worthy of Fourteenth Amendment Due Process. The potential possibilities are beyond the range of reasonable speculation, and the costs to the states in judicial time and fiscal expenditures are beyond the range of reasonable budgetary computation.

IV. THE PRESENT TREND AMONG A LARGE NUMBER OF STATES REQUIRING COUNSEL BY STATUTE OR COURT DECISION INDICATES THAT APPOINTMENT OF COUNSEL IS DESIRABLE, BUT IS NOT REQUIRED FOR THAT REASON ALONE.

The Respondent readily admits that there is a popular trend among the various states that have either by legislative enactment or judicial decree, provided that counsel be appointed for indigent parents in various actions affecting their relationship to their children. *See generally,* Brief for Petitioner 15, nn 6-9, and Appendix B. Also respondent is aware of the various model statutes and codes that are recommended as guidelines to follow in considering and drafting proposed legislation to regulate the family relationship at stake here. *See generally,* Amicus Brief of American Bar Association 18-20.

While I would in no way try to ignore or minimize the collective wisdom reflected by these various legislatures, courts, and organizations who have expressed their opinions on this subject, I must submit respectfully that this trend in opinion, though persuasive, should not be the basis on which a constitutional decision is made. The Court must look to the Constitution and ascertain whether the right claimed can be found or implied within its provisions. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1972). The right to appointed counsel at state expense to protect a right, other than the individual liberty interest contemplated by the Sixth Amendment, is not found in the Constitution. I submit that the Due Process Clause of the Fourteenth Amendment reasonably cannot be read to require it in this instance without extending it to every right deemed fundamental. Therefore, its provision is a matter of legislative policy.

At the writing of this brief, there are some thirty-three states and the District of Columbia that have legislation authorizing appointment of counsel for the indigent parent in proceedings to terminate parental rights. *See,* Brief for Petitioner, Appendix B. North Carolina provides for appointment of counsel for certain parents in some special circumstances. G.S. § 7A-289.23 requires a guardian ad litem for a defending parent under the age of fourteen years, and, effective August 24, 1980, requires appointed counsel to represent a parent against whom a termination petition alleging mental incapacity as a basis for termination is brought.[10] The basis for such appointments however,

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[10]As part of the same amendment, G.S. § 7A-289.32, entitled *Grounds for terminating parental rights,* was amended by adding subsection (7) which reads; "That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. § 7A-517(13), and that there is a reasonable probability that such incapacity will continue throughout the minority of the child."
Counsel for the Respondent is the author of that amendment.

is not indigency, but the traditional concept that infants and incompetents cannot represent adequately their own interests.[11]

The North Carolina legislature has considered other bills to provide for appointed counsel for all indigent parents in termination of parental rights proceedings. During the 1977 Session, identical bills, Senate Bill 23 and House Bill 76, both introduced on January 26, 1977 would have allowed the trial judge, in his discretion, to appoint counsel at state expense for the indigent parent. Senate Bill 23, was reported favorably out of the Senate Committee on the Judiciary on February 2, 1977, and sent to the Joint Committee on Appropriations. House Bill 76 was reported favorably out of the House Committee on the Judiciary on April 19, 1977, and sent to the Joint Committee on Appropriations. These bills and their histories are found in Appendix A. No further evidence of their being considered by the respective legislative bodies is indicated, and it is presumed they died in the Joint Appropriations Committee.

Effective, January 1, 1980, G.S. §7A-587 provides that indigent parents in abuse, neglect, and dependency proceedings are entitled to court-appointed counsel. Petitioner declares this distinction between termination actions and neglect, abuse and dependency proceedings to be ironic. (Brief for Petitioner 43 n. 48). However, there are sufficient differences to justify the distinction.

The Respondent Department in its Brief In Opposition, filed in response to the Petition for Certiorari, discusses in some detail the statutory scheme, provided for reporting, investigating and disposing of allegations of abuse, neglect and dependency in North Carolina. These statutes are reproduced in Appendix B. *See, generally,* Respondent's Brief in Opposition 7-8. This is the state's *parens patriae* function which has been delegated to the county Department of Social Services. Actions brought under these statutes represent the initial intrusion by the state into the private realm of family life. This intrusion is

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[11]The statutory section cited specifically refers to G.S. Rule 17, 1A-1 of the Rules of Civil Procedure. Subsection (c) of that rule is titled *Guardian ad litem for infants, insane, or incompetent persons.*

made necessary when the parents, who are presumed to be acting in the child's best interests, demonstrate by their actions that they are not. *See, Parham v. J.R.*, 442 U.S. 584, (1979); *Stanley v. Illinois*, 405 U.S. 645 (1971). Such demonstration requires state intervention to ensure protection of the child through, as the legislature describes it, "a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety. (G.S. §7A-516 (3)) As recognized in Stanley, *supra*, "these are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children." *Id.*, at 652.

Recognizing the importance of the family unit, and the significance of the intrusion into it by this intervention, the state has provided that parents be given notice, (G.S. §7A-560)) and an opportunity to be heard, (G.S. §7A-565) allowed to be represented by counsel, appointed if they are indigent, (G.S. §7A-586 and 587 and a hearing (G.S. §7A-629) in which the rules of evidence applicable to civil proceedings apply, (G.S. §7A-634(b)) and the burden of proof is clear, cogent and convincing evidence. (G.S. §7A-635). The judge has broad discretion to enter a dispositional order (which may include consideration of the many community based services that Petitioner refers to, Brief for Petitioner 30) to endeavor to meet the needs of the child and his parent, individually, and as a family unit. (G.S. §7A-647).

After the child has been removed from his parents, the interests of the parent and those of the child may diverge. When the parents demonstrate "that they will not provide the degree of care which promotes the healthy and orderly physicial and emotional well-being of the child . . .," (G.S. §7A-289.22(1)) then recognition of the child's interest in a "permanent plan of care" (G.S. §7A-289.22(2)) must focus away from his parents. The statutes providing for termination of parental rights in effect at the time this action was filed are also reproduced in Appendix B.

The legislature has recognized that those individuals or agencies standing *in loco parentis* to the child (G.S. §7A-289.24)

assume an interest in planning for his future. At such point as they realize that the child's need for a permanent plan of care apart from his legal or biological parent outweighs the interest in maintaining the integrity of the family unit, *See, Parham v. J.R. supra,* at 602, then they are authorized to petition the court for a determination of whether or not termination of the parent's rights are in the child's best interest.

It cannot be denied that the state has interests in these proceedings. The state is required by law to maintain the State Foster Home Fund G.S. 108-23(5), and provides up to 50% of the costs of care of children in foster care under the Foster Home Fund. (The County must provide the balance.) But the supreme interest, as reflected in the statement of legislative intent, G.S. §7A-289.22, is that of the child. With regard to those children living with individuals authorized to initiate termination petitions, the state's interests is *de minimis.*

On the other side of the coin however, the State has a significant interest in not establishing a system of appointed counsel in these proceedings. The State could authorize payment of counsel in those actions initiated by a department of social services, but if the basis for doing so is to preserve a fundamental family interest of the responding parent, then the state would be foreclosed by the Equal Protection Clause of the Fourteenth Amendment from denying appointed counsel for the indigent parent in *any* proceeding brought under the termination statute, regardless of who initiates it. Nowhere is it required that the state fund lawyers to represent parties in a purely private controversy, regardless of whether the interests involved are fundamental or not.

Ms. Lassiter states, without citation of authority, that if the county department of social services initiates the termination action, that the district attorney or county attorney will represent the department in the proceeding. Brief for Petitioner 26. There are several counties in North Carolina, as reflected in Appendix C, where the departments of social services present their termination petitions *without* benefit of counsel. The point to be made is not that counties cannot afford counsel any better than parents, but that the inherent imbalance of resources in these

proceedings is not nearly as great as that alluded to by the Court in *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) in extending the right to counsel in criminal actions to include appointed counsel.

Though the efforts of the departments of social services in both abuse, neglect, and dependency proceedings and termination actions arise from concern for children and their families, the former actions result from and reflect, the public's interest in the protection of the children, while the latter actions do not. It is this distinction which justifies the appointment of counsel in the abuse, neglect, and dependency proceedings representing the initial intrusion into the fundamental family unit, while not requiring it in the termination actions where the interests are more individual, private, and (as far as the "family" interest is concerned) less fundamental. Part V, B-C, *infra.* This is where the state of North Carolina has drawn the distinction. "[A] state can, consistent with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process . . . Absolute equality is not required; lines can be and are drawn, and we often sustain them." *Douglas v. California,* 372 U.S. 353, 356-357 (1963).

While appointment of counsel in both termination of parental rights and abuse, neglect and dependency proceedings may be desirable as a matter of social policy as indicated by the trend in other states, such provisions, absent constitutional mandate, are within the legislative prerogative. As stated by Mr. Justice Douglas in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955):

> "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirements . . . The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident or out of harmony with a particular school of thought." *Id.,* at 487-488.

He reiterated this idea in *Griswold v. Connecticut,* 381 U.S. 479 (1965): "We do not sit as a super-legislature to determine the

wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.*, at 482.

While it is apparent that the legislature of North Carolina is reluctant to provide, wholesale, for appointed counsel for the indigent parent in termination proceedings, it is in that forum that the right to appointed counsel should be created, if at all, The legislatures of the various states are in a much better position to regulate the extent of application of such a right, and such regulation should be left to them. "For protection against abuses by legislatures the people must resort to the polls, not to the courts". *Munn v. State of Illinois,* 94 U.S. 113, *Quoted in Williamson v. Lee Optical of Oklahoma, supra,* at 486.

V. APPOINTMENT OF COUNSEL IS NOT REQUIRED IN THE INSTANT CASE BY THE PRINCIPLE ENUNCIATED IN *MATHEWS V. ELDRIDGE,* 424 U.S. 319 (1976).

As indicated by Ms. Lassiter, Brief for Petitioner 18, the Court in *Mathews v. Eldridge,* 424 U.S. 319 (1976) set forth a triparite test,[12] or balancing mechanism to be used in deciding "[w]here procedural due process must be afforded . . ." because a property or liberty interest is implicated. *Smith v. Organization of Foster Families,* 431 U.S. 816, 847 (1977).

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[12]The specific language enunciated by the court in *Mathews v. Eldridge,* is as follow:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

A. The *Mathews* Principle Is Not Applicable To A Judicial Proceeding Where The Person Whose Rights Are Affected Is Given Notice And Opportunity To Be Heard Prior To A Decision.

At the outset of this discussion Respondent would suggest that the *Mathews* principle as a rule of law, is inapposite to this action. The process of refining due process applications until the present statement of the principle in *Mathews* took place over a long period of time. The cases cited by the Court in *Mathews* involve the determination of *when* and *in what manner,* individuals would be afforded a hearing relative to some claimed right or interest. *Mathews v. Eldridge, supra,* at 332-34. Clearly, however, the actions challenged in those cases as denying due process were either administrative,[13] or *ex parte* quasi-judicial actions[14] negatively affecting the right or interest without giving the individual notice and opportunity to be heard prior to the action. In fact, the very question in *Mathews* was whether the Social Security Administration could terminate disability payments before affording the recipient an evidentiary hearing, ultimately, before a Social Security Administration law judge. The balancing of the individual interest against that of the government was required to ensure that the methods the government had adopted to regulate Social Security disability did not deprive the recipient of his benefits erroneously Implicit in this reasoning is that the government was acting in its own interest through its own devices to regulate benefits. Clearly the government has an advantage under those circumstances. This advantage is reduced when, as here, the Department is asking the Court to terminate parental rights in full evidentiary hearings.

Had the Department, under some statute or regulation, made some administrative decision that legally was binding on Ms. Lassiter with regard to her right to the child without affording her a prior opportunity to be heard, then the *Mathews* balanc-

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[13] *See e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

[14] See e.g., *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Armstrong v. Manzo,* 380 U.S. 545 (1965).

ing approach would be applicable to the case at bar. However, Ms. Lassiter was given all the notice and opportunity to be heard required by the Due Process Clause of the Fourteenth Amendment prior to the determination of her interests, *Goldberg v. Kelly, supra; Armstrong v. Manzo,* 380 U.S. 545 (1965), and in view of her failure to respond to the Petition, perhaps more. *See, Boddie v. Connecticut, supra,* at 378-79. (In fact, it reasonably could be argued that the efforts of counsel for the Department to ensure her presence at the hearing violated her right to waive the opportunity to be heard.) This was not an administrative proceeding or an *ex parte* judicial proceeding. It was a full evidentiary hearing, with both parties present, testifying and cross-examining witnesses, prior to the termination of her rights. Regardless of Ms. Lassiter's assertion that the right affected is a fundamental right, procedural due process requires no more than was provided to her in this proceeding.

B. The Right To Maintain A Purely Biological Relationship To One's Child Is Less Fundamental Than The Right To Family Integrity.

As pointed out above, the concept of family integrity derives from the idea of togetherness. In *Parham v. J.R.,* 442 U.S. 584 (1979), this Court stated it this way: "Our jurisprudence historically has reflected western civilization concepts of the *family as a unit* with broad parental authority over minor children. Our cases have consistently followed that course. . . " *Id.,* at 602 (emphasis added). Implicit in the cases decided by the Court recognizing family integrity is that the care, custody, and nurturance,[15] medical care,[16] religious indoctrination, inculcation of morality[17] education instruction,[18] and decision whether

[15] *See, Prince v. Masachusetts,* 321 U.S. 158 (1944)

[16] *See, Parham v. J.R., 442 U.S. 584 (1979)*

[17] *See, Wisconsin v. Yoder,* 406 U.S. 205 (1972)

[18] *See, Wisconsin v. Yoder, supra; Pierce v. Society of Sisters,* 268 U.S. 520 (1925)

or not to have children[19] can best be determined within a cohesive family unit, precisely because the children are living with their parents who are presumed therefore, to be in the best position to act in the children's best interests. This Court has recognized, however, that this is not an irrebuttable presumption: "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this." *Parham v. J.R., supra,* at 602.

The Department does not challenge the Petitioner's claim that the right to family integrity is one of the most fundamental rights known to man. *See,* Brief for Petitioner 19. But, "[P]arental Rights do not spring fullblown from the biological connection between parent and child. They require relationships more enduring." (*Caban v. Mohammed,* 441 U.S. 380, 397, (1979), (Mr. Justice Stewart, dissenting). The "family integrity" of which Ms. Lassiter insists she was deprived is somewhat different therefore, from that contemplated in those cases defining family integrity as a fundamental interest.

> ". . . [T]he importance of the familial relationship, to the individual involved and to society, *stems from the emotional attachments that derive from the intimacy of daily association* and from the role it plays in 'promoting a way of life' through the instruction of children, *Wisconsin v. Yoder,* 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship. *Smith v. Organization of Foster Families,* 431 U.S. 816, 844. (1977) (emphasis added.)

While it is unchallenged that the right to the care and custody of one's child is fundamental, the Respondent respectfully suggests that once the state has, through a custody proceeding, invaded this sphere of fundamentally protected interest, the parent's interest thereafter must be balanced not only against that of the state, but also that of the child. In *Morrissey v.*

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[19]*See, Griswold v. Connecticut,* 381 U.S. 479 (1965); *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

Brewer, 408 U.S. 471 (1972) the Court drew a distinction between the unqualified liberty interest of the unconvicted person, and that of the convicted parolee whose liberty interest was made conditional by the conviction which required him to meet the conditions of his parole to remain free. *Id.*, at 480. Because his freedom was qualified by a conviction and conditional upon his complying with the terms of parole, he was entitled to less due process in a parole revocation hearing than in a trial of the criminal charge. *Id.*, at 489.

An appropriate analogy can be drawn between the parent's right to family integrity, and the personal liberty interest of the parolee. When the child is with the parent, who is presumably acting in his best interests, the parent's interest in family integrity is unqualified. Efforts to intervene require the most due process the Fourteenth Amendment will allow. However, after the state intervenes in an abuse, neglect, or dependency proceeding and removes the child from the custody of the parent, then the parent's interest becomes qualified and therefore conditional on his continuing to act in a parental fashion toward the child. Subsequent legal actions affecting that qualified, conditional interest would, by the analogy to *Morrissey,* require somewhat less due process.

If the parent allows his continued interests in the child to atrophy while he is in the care of, and in daily association with, other individuals, then by the definition of the familial relationship set out in *Smith v. Organization of Foster Families, supra,* the parent's interest devolves more and more to a mere blood relationship and becomes less and less fundamental. The familial relationship of the child becomes linked more and more clearly with those individuals with whom he is in daily association. The longer the child continues in this substitute family relationship, the greater becomes not only his physical and emotional interest in maintaining that relationship, but also the recognition that this interest has legal significance when balanced against that qualified interest of his biological parent. *Smith v. Organization of Foster Families, supra,* 844 (1972).

It is the recognition of this divergence in the interests of the parent and child and the importance to the child of physical and

emotional stability deriving from an intact, functioning family unit that is reflected in the legislative intent of the North Carolina statutory scheme provided for termination of parental rights. *See,* N.C.G.S. §7A-289.22(3) The child develops a right to a familial relationship separate and apart from the parent's right to maintain the blood relationship. Thus the balancing of these interests must shift from consideration of the parent's interest in an intact family unit, *vis a vis* the state, to that of the parent versus that of the child. *See,* N.C.G.S. §7A-289.22(3). I would submit therefore, that the parent's right to maintain that purely biological relationship is no more fundamental in due process terms, than the right to maintain that conditional qualified personal liberty of the parolee in *Morrissey.*

C. Petitioner's Lack Of Interest In Her Child Had Reduced Her Right To Him To A Purely Legal One Devolved From The Blood Relationship.

It is clear that there is no familial relationship deriving from the intimacy of daily association between Ms. Lassiter and her son, William. He was born on September 26, 1974 and was only eight months old when he was removed from the custody of his mother because of neglect and placed in foster care on May 23, 1975. Joint Appendix, 5-6. At that time her daily association with him ceased. The record indicates that she has seen him no more than three times since he went into foster care. From that time on, her right to care for, nourish, raise, educate and enjoy the companionship of her child, *See, Stanley v. Illinois,* 405 U.S. 645, 651(1972) was markedly attenuated. It was the custody proceeding that deprived her of these fundamental family rights, long before the Petition to terminate her rights was filed. However, she did not challenge that proceeding on appeal, nor even appear to contest the hearing that resulted in the removal of the child. Transcript of Evidence 29.

The removal of William from Ms. Lassiter per the custody proceeding in May, 1975 rebuts in this case the presumption that Ms. Lassiter always acted in his best interests. One can further infer from the fact that she failed to appear at the hearing on

that removal failed to contact the Department with a single inquiry as to his whereabouts or care, or to make one request for a visit with him,[20] Transcript of Evidence 20, that her interest in him dissipated rapidly. The child was in the custody of the Department for more than a year prior to her incarceration, yet Ms. Lassiter made no effort to express any interest or affection toward him. One would think that seeing him in a chance encounter in town, Transcript of Evidence 36, would have stirred those "natural bonds of affection" in Ms. Lassiter enough to make her inquire about his welfare. *See,* Parham v. J.R., supra, 602. The *Affidavit* of Mr. Loflin, Joint Appendix 11, would indicate tht Ms. Lassiter can read and write, as she wrote to him about potential relief from imprisonment,[21] yet she never wrote to the Department about the child. Transcript of Evidence 15-16. While it is true, as Ms. Lassiter indicates, that her incarceration would prevent a finding of willful abandonment, Brief for Petitioner 37, it would not prevent her from "establishing or maintaining concern . . . as to his welfare," G.S. §7A-289.32(1) or in making and following "through with constructive planning for the future of the child." G.S. §7A-289.32(3).

The final indication of the actual lack of interest in the child is that even though Ms. Lassiter made objections at the hearing to the court's termination of her rights, nothing has been done to protect her relationship to the child pending the outcome of this appeal, even though G.S. §7A-289.34 specifically allows for "temporary orders affecting the custody or placement of the child" pending appeal of the Order of Termination. Though

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[20]The one visit Ms. Lassiter had with William in December, 1979 was arranged by the Department. Transcript of Evidence 20.

[21]It is not unreasonable to assume that by the time of the hearing on August 31, 1978, Ms. Lassiter as a result of her association with Mr. Loflin, was far more interested in the efforts to have her released from prison, than in maintaining her rights to her son. *But cf, In re Gibson,* 438 P.2d 131, 135 (1971). (parental rights are "more precious to many people than the right to life itself.") This may explain her failure to mention this proceeding to him.

Notice of Appeal was promptly filed, Joint Appendix 9, no motion or petition was filed to have the court stay the effect of the termination order, or to provide for any activity that would preserve whatever meaningful relationship there might have been pending appeal.[22]

VI. THERE IS LITTLE RISK OF ERRONEOUS TERMINATION OF PARENTAL RIGHTS INHERENT IN THE NORTH CAROLINA STATUTORY SCHEME PROVIDED FOR SUCH TERMINATIONS.

A. The Statutory Scheme Is Designed To Prevent Erroneous Terminations Where A Meaningful Relationship Exists Between Parent And Child.

The statement of legislative intent in the termination statutes, G.S. §7A-289.22 *et seq.*, reflects the recognition that family integrity is of significant importance to both parent and child. Therefore, the jurisdiction to consider petitions to terminate rights is in a court, not any administrative agency. G.S. §7A-289.23. Only individuals or agencies who by law or other-

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[22]*See, Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) at 844. The minor continued to live in the same foster home until the Petition for Discretionary Review was denied by the North Carolina Supreme Court on January 17, 1980. Joint Appendix 28. Until that time, he was considered a "legal risk" for adoptive placement because of the possibility of reversal of the order terminating parental rights. Thereafter he was placed in a pre-adoptive home with foster parents committed to formal adoption to become his legal parents. He continues there to date. The Petition for Certiorari was filed in this Court prior to initiation of any adoption proceedings in the State Court. Counsel for Ms. Lassiter asked for and received assurance from Counsel for Department that no adoption would be undertaken pending the final outcome of the appeal in this Court. This was done to obviate his filing of a motion *in limine* to stay such action.

wise standing *in loco parentis* have responsibility for the child, can initiate such action. G.S. §7A-289.24. Notice of the proceeding by way of service of Summons and Petition must be given to the parent, who, after being served, has thirty (30) days in which to respond or "be heard". G.S. §7A-289.27. *See, Armstrong v. Manzo,* 380 U.S. 545 (1965); *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950); Should the parent fail to respond, presumably waiving his opportunity to be heard, and order terminating his right will be entered on default at a required hearing before the court, G.S. § 7A-289.28, provided the court at that hearing does not determine either that grounds for termination do not exist, G.S. §7A-289.31 (c), or that the best interest of the child require that rights not be terminated irrespective of the existence of grounds for termination. G.S. 7A-289.31 (a) and (b).

These statutory procedures are an effort to provide for the objective examination of the respective interests of the child and the parent by a court in an evidentiary hearing. This is done only after all interested parties have been given the requisite notice and opportunity to be heard in such proceeding before parental rights are terminated. It is these procedural due process requirements that are considered essential to preserve some liberty or property interest. *See, generally, Parham v. J.R.,* 442 U.S. 584 (1979); *Smith v. Organization of Foster Families,* 431 U.S. 816 (1977); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Armstrong v. Manzo, supra,* and *Mullane v. Central Hanover Trust Co., supra.* There is no question that Ms. Lassiter was afforded ample due process in this action. Whether or not the filing of a written answer is a prerequisite to being afforded notice of the hearing, Ms. Lassiter not only received notice, but also was present and was heard.

"Procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra,* at 344. Petitioner argues that without representation by counsel, the risk of erroneous deprivation in termination proceedings

under the statutory scheme is substantial. Brief for Petitioner 27. This does not seem to be the case, however.

As Petitioner correctly points out, Brief for Petitioner 48, statistics reflecting numbers of termination proceedings and related questions are rare. In North Carolina there are no apparent means of tracking such information. Therefore, in early November, 1980 a questionnaire was sent by counsel for the Department to each of the 100 counties of the state seeking information relative to termination proceedings. By December 5, 1980 seventy-three of the counties had responded. A copy of the questionnaire and the responses received from each county are found in Appendix C. The raw data has been submitted to the Counsel for Petitioner for their use. While it is admitted that these are of quite limited use, they are offered as the only available statistical information related to termination proceedings in North Carolina.

The results of the survey indicate that since October 1, 1977,[23] there have been at least 768 actions to terminate parental rights initiated by the county departments of social services in 73 of the 100 counties. In about 127 of these, or 16.5% the parents were represented by counsel. In only six were the rights not terminated even though grounds for termination existed. In only two were the petitions dismissed for lack of grounds for termination. That in six cases the court refused to terminate in spite of grounds, does not mean necessarily that this resulted from legal representation. In at least one case, the judge refused to terminate even though grounds existed and the parent was not represented by counsel.

There was no consistent reporting of the number of cases where the parents were not represented, but contested the action. Under Petitioner's theory these are where erroneous terminations occur. The seven cases where counsel assisted the parent and rights were not terminated represently only 5.5% of all cases where counsel was present. The other 94.5% are, under

[23]This is the effective date of the present termination statute.

Petitioner's theory, assumed to be correct in spite of representation by counsel. Many counties, however, reported that most of their petitions were either against absent fathers who were served by publication, or that the parent, otherwise served, failed to respond.[24] These numbers are of further significance because they reflect that the department does not often bring actions that are groundless. In 6 out of the 8 cases where rights were not terminated, grounds existed, but rights were not terminated for other reasons.

Finally, Respondent would not deign to argue that the presence of counsel would not facilitate the submission of evidence in a hearing. However, a reading of the grounds for termination does not lead to any definitive conclusions that a layman cannot understand the allegations inherent therein, and tell the court how he has made some effort to maintain concern and a sense of responsibility for the child, or improved those conditions that led to the child being removed initially, or worked with the social services department to strengthen his parental relationship to the child, or planned for the child's future. It is unlikely that any court would not respond to any rational, realistic statement on the part of an unrepresented parent if it contains any indication that a meaningful familial relationship exists with the child. That only two cases out of 768 that were reported in the survey were dismissed because of lack of grounds is some fair indication that if there is some meaningful familial relationship the Department would not initiate the Petition in the first instance.

B. There Was No Error In This Proceeding For The Termination Of Petitioner's Rights.

In the hearing on August 31, 1978, Ms. Lassiter admitted that on the day of the custody hearing, June 16, 1975, the social

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[24]Illustrative of the comments are: Beaufort (8 cases) "only one parent has ever been present at the hearing." Catawba (22 cases) "majority of these are unknown fathers". Halifax (10 cases) "no parent has responded." Mecklenburg (123 cases) "85-90% of the parents do not respond at all, default." Robeson (16 cases) "all uncontested."

worker had called to tell her about the hearing. Transcript of Evidence 31, and that she told him ". . . I said, I ain't going . . . I jus said, I'm going to court about my own child?" Transcript of Evidence 32. When informed by the judge that he had sent a sheriff to get her, but she was not there, she responded that she had "just went up there to the store. Transcript of Evidence 33. Ms. Lassiter was generally vague in her responses to questions asked her about her relationship with her child.[25] However, with regard to her incarceration, she was quite specific.[26] Ms.

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[25]For example, Ms. Lassiter testified that "he knows all of us, my children."

QUESTION: How does he know you? How do you even know that he knows you if you haven't seen him in a year?

ANSWER: Well, he knows us.

QUESTION: Just because you are his family?

ANSWER: He knows us. Children know they family. I don't care which way it is, children know they family . . ." Transcript of Evidence 40.

Later she was asked:

QUESTION: And he has been in foster care for over three years of his four-year life, isn't that right? He was eight months old when he went into foster care, isn't that right?

ANSWER: Sir how would you feel if somebody came and got your child and took it away like that?

QUESTION: Just answer my question. He's been in foster care since he was eights months old?

ANSWER: I don't know how long he has been in there.

Transcript of Evidence 41.

[26]For example:

QUESTION: How long are you going to be in prison?

ANSWER: I don't know. I'm waiting for the hear from my lawyer soon.

QUESTION: What are you convicted of?

ANSWER: Well, I'm here. I'm here got accused, got a charge, I'm accused of murder, second degree murder and I'm accused of it. And I'm framed, or something.

THE COURT: How much time did the Judge give you?

ANSWER: Well, twenty-five to forty years. Transcript of Evidence 39.

Lassiter was given ample opportunity to tell about her relationship with her child. The evidence is clear, however, that she had not seen him enough to maintain any meaningful relationship, or made any realistic, sincere effort to express any interest or concern for his welfare.

In trying to get Ms. Lassiter to cross-examine the Department's witness, the judge asked her nine different times if she wanted to ask any questions. Transcript of Evidence 19-24. The one question Ms. Lassiter asked was: "I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us." The social worker began to respond by saying: "Ms. Lassiter, your son has been in foster care since May of 1975 and since that time . . ." Immediately, Ms. Lassiter cut her off with: "Yeah, yeah and I don't know anything about it either." Transcript of Evidence 20. Though the judge was patient with her in trying to confine her cross examination to questions, Ms. Lassiter tried to use the opportunity to argue with the witness.

Ms. Lassiter points out that she had wanted her child to be placed with her mother, and offered this as her "constructive plan" for the child. Brief for Petitioner 39-42. The social worker and grandmother contradicted each other as to whether or not she could take care of the child. *Compare,* Transcript of Evidence 14, with Transcript of Evidence 52. Evaluating the credibility of the witnesses in this contradiction and affording weight to their testimony is the prerogative of the trier of fact. The point of this recital is that it evidences an effort on the part of the social worker to consider this plan enough as an alternative to discuss it with both the Petitioner and her mother. There is a total lack of evidence that the grandmother ever made any effort at all to actively visit with the child, or plan with the social worker for him to live with her.

One final point needs to be made with regard to Petitioner's claim that because of her lack of representation, improper, incompetent and inadmissable evidence was elicited against her, and that defenses available to her went unnoticed. Brief for Petitioner 43 and 45. As with the refusal of the judge to grant a delay, Part I, *supra,* she could have preserved many of her exceptions to these alleged errors in the hearing in her Record on

Appeal, and assigned them as error to the North Carolina Court of Appeals. Her failure to do so constituted an abandonment of these claims under the North Carolina Rules of Appellate Procedure. *See,* Footnote 1, *supra.* Her appeal was perfected with assistance of counsel, and all these exceptions and potential assignments of error based thereon were available to her at the outset of her appeal. Therefore, her collateral quarrel with them now in the first instance as a procedural device to persuade the Court that appointment of counsel will correct them should not be afforded much deference.

VII. THE GOVERNMENT'S INTERESTS IN THIS TYPE OF PROCEEDING ARE SUBSTANTIAL.

The interest of prime importance in this proceeding is that of the child. The State of North Carolina has, as have most if not all states, provided for protection of the child in those instances where the parent cannot, or will not, provide the requisite degree of care and supervision. It was precisely that interest in the child's welfare that resulted in his being placed in foster care.

The state, by the procedures utilized in the termination proceedings, tries to balance the family interests of the individuals against the public treasury. It recognizes that many parents have little or no realistic interest in the child by the time a termination petition is filed. The procedures provided by the North Carolina statutory scheme balances this reality against the possibility that some meaningful relationship continues to exist. Thus, the significance of the family relationship requires a hearing in every case. The high default rate weighs against unnecessary expenditure of public money for appointed counsel in every case, or even those in which the parent is indigent. Ms. Lassiter argues that without counsel the parent is likely to make an unintelligent waiver of a right to contest the hearing. Brief for Petitioner 28. By this argument, the court would be forced to appoint counsel every time a Petition to terminate is filed, or at least whenever personal service is obtained, to ensure that the parent not only has notice, but also an opportunity to be heard. Under this set of circumstances, the appointment would have to

be made without any evidence of indigency, or the court would have to hold another, preliminary, hearing to determine indigency.[27] This idea runs contrary to Petitioner's theme that without counsel, "valuable judicial resources will be expended on cases that should not go to trial." Brief for Petitioner 29. It would increase vastly expenditure of judicial resources.

Further, it takes little imagination to see that with appointed counsel, virtually every case would be contested, increasing even more the expenditure of administrative and judicial resources. Presuming that with counsel, parents may contest cases that they ordinarily would not, then a guardian ad litem would have to be appointed to protect the minor child pursuant to G.S. § 7A-289.29(b). That would increase costs for cases significantly in spite of the indication that even with counsel, rights are terminated in the vast majority of the cases. Appendix C.

The potential costs of appointed counsel in termination proceedings only, is admittedly *de minimis* compared to the costs in all criminal actions. However when one considers the potential for requiring appointed counsel in any civil case where the indigent seeks to protect a fundamental right such as a domestic relations action, the costs would be substantial. More importantly than the costs involved, however, is the state's interest in facilitating the realization of a permanent plan of care for those minor children who have no realistic relationship with their biological parents, while affording those parents who are involved with their children the opportunity to show the degree and quality of that involvement. These are individual interests, and the state has afforded them protection by providing a statutory scheme that adequately balances the interest of the parent with that of the child in compliance with Fourteenth Amendment Due Process, without imposing an unnecessary financial burden on the state treasury.

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[2] If the parent will not respond to a Summons and Petition to Terminate her rights, why would she respond to a Summons to appear to offer evidence of indigency in order to appoint counsel to assist her to answer the Petition?

CONCLUSION

In this action brought to terminate her parental rights to her son, the Petitioner, Ms. Lassiter, had notice of the action, was present for the hearing, testified and was allowed to cross-examine witnesses. The Due Process Clause of the Fourteenth Amendment requires no more in an action where the interest affected is something other than one's individual personal freedom from restraint. Having been afforded the requisite due process, the petitioner's rights were terminated, and the Respondent Department requests that North Carolina Court of Appeal's affirmation of that action be sustained.

Respectfully submitted, on this the 15th day of December, 1980.

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APPENDIX

APPENDIX A

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1977

SENATE BILL 23

Short Title: Counsel in Parental Rights Cases. (Public)
Sponsors: Senator Britt.
Referred to: Judiciary II.

January 26, 1977

A BILL TO BE ENTITLED

AN ACT TO AMEND G.S. 7A-451 and 7A-288 SO AS TO PROVIDE COUNSEL, IN THE COURT'S DISCRETION, TO INDIGENT PARTIES IN A PROCEEDING FOR THE TERMINATION OF PARENTAL RIGHTS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 7A-451(1) is amended by adding a new subdivision thereto to read as follows:

"(12) A hearing for termination of parental rights as provided for in G.S. 7A-288."

Section 2. G.S. 7A-288 is amended by adding thereto between the second and third paragraphs a new paragraph to read as follows:

The court may, in its discretion, appoint counsel to represent one or more indigent parties as defined by G.S. 7A-450(a) in a proceeding under this section. Costs shall be borne by the State."

Sec. 3 All laws and clauses of laws in conflict with this act are hereby repealed.

Sec. 4 This act shall become effective upon ratification.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1977

HOUSE BILL 76
Committee Substitute Adopted 4/19/77

Short Title: Provide Cousel, Indigent People. (Public)
Sponsors: Representative.
Referred to: Judiciary I.

January 26, 1977

A BILL TO BE ENTITLED

AN ACT TO AMEND GENERAL STATUTES CHAPTER 7A TO PROVIDE COUNSEL IN THE COURT'S DISCRETION TO INDIGENT PARTIES IN A PROCEEDING FOR THE TERMINATION OF PARENTAL RIGHTS.

The General Assembly of North Carolina enacts:

Section 1. G.S. Chapter 7A, Article 36, is amended by inserting therein the following new section:

"§7A-451-1. **Discretionary entitlement.** — At the discretion of the judge, counsel may be provided to any indigent party in a hearing for termination of parental rights under G.S. 7A-288."

Sec. 2. G.S. 7A-288 is amended by inserting after the second paragraph thereof the following new paragraph:

"The court may, in its discretion, appoint counsel at State expense to represent one or more indigent parties, as defined in G.S. 7A-450(a), in a proceeding under this section."

Sec. 3. This act shall become effective upon ratification.

INSTITUTE OF GOVERNMENT LEGISLATIVE SERVICE
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GENERAL ASSEMBLY OF NORTH CAROLINA

BILL HISTORY
AS OF 06/16/78

NOTE – SENATE AND HOUSE BILL NUMBERS ARE FOLLOWED BY THE SHORT TITLE, DATE OF INTRODUCTION, IDENTICAL BILL NUMBER IF ANY, PUBLIC OR LOCAL DESIGNATION, INTRODUCER NAMES, GENERAL STATUTE CHAPTERS OR OTHER SUBJECTS AFFECTED (OR COUNTIES, IF LOCAL BILL), AND ALL ACTIONS TAKEN.

S0023 COUNSEL FOR INDIGENTS-PARENTAL RTS 1-26-77 IDENT TO H0076 PUBLIC
INTRODUCERS-BRITT
SUBJ OR GS CHAPTERS - 7A JUDICIAL DEPT

1-26-77 S-REF TO COM ON JUDIC 2	0041	2-02-77 S-REPTO FAV AS AMENDED	0043
2-02-77 S-COM AMEND ADOPTED	0060	2-02-77 S-RE-REF COM ON APPROPRN	

S0023 6-30-77 S-POSTPONED INDEF 0945

H0076 COUNSEL FOR INDIGENTS-PARENTAL RTS 1-26-77 IDENT TO S0023 PUBLIC
INTRODUCERS-HELMS GILMORE/HAWORTH
SUBJ OR GS CHAPTERS-7A JUDICIAL DEPT

1-26-77 H-REF TO COM ON JUDIC I	0049	4-19-77 H-REPTD FAV COM SUBSTITUTE	
4-19-77 H-COM SUBSTITUTE ADOPTED	0475	4-21-77 H-PASSED 2ND & 3RD READING	0501
4-22-77 S-REC FROM HOUSE		4-22-77 S-REF TO COM ON COURTS	0389
4-27-77 S-REPTD FAV	0405	4-27-77 S-RE-REF COM ON APPROPRN	

APPENDIX B

GENERAL STATUTES OF NORTH CAROLINA CUMULATIVE SUPPLEMENT 1979

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41

Purpose; Definitions.

§7A-516. Purpose. – This Article shall be interpreted and construed so as to implement the following purposes and policies:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety. (1979, c. 815, s. 1.)

ARTICLE 44

Screening of Abuse and Neglect Complaints.

§7A-544. Investigation by director; notification of person making the report. — When a report of abuse or neglect is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services shall be held in strictest confidence by the Department.

If the investigation reveals abuse or neglect, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juveni'e's protection pursuant to Article 46 of this act.

In performing any of these duties, the Director may utilize the staff of the county Department of Social Services or any other public or private community agencies that may be available. The Director may also consult with the available State or local law enforcement officers who shall assist in the investigation and evaluation of the seriousness of any report of abuse or neglect when requested by the Director.

Unless a petition is filed within five working days after receipt of the report of abuse or neglect, the Director shall give written notice to the person making the report that:

(1) There is no finding of abuse or neglect; or

(2) The county Department of Social Services is taking action to protect the welfare of the juvenile and what specific action it is taking.

The notification shall include notice that, if the person making the report is not satisfied with the Director's decision, he may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive his right to this notification and no notification is required if the person making the report does not identify himself to the Director. (1979, c. 815, s. 1)

§7A-548. Duty of county Department of Social Services to report evidence of abuse. — If the Director finds evidence that a juvenile has been abused as defined by statute, he shall immediately make a written report of his findings to the prosecutor who shall determine whether criminal prosecution is appropriate and who may request the Director to sign the appropriate criminal warrant. The Director of the Department of Social Services shall submit a report of alleged abuse or neglect to the central registry under the policies adopted by the Social Services Commission. (1979, c. 815, s. 1.)

ARTICLE 45

Venue; Petition; Summons.

§7A-560. Petition. — The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of his parent, guardian, or custodian and shall allege the facts which invoke jurisdiction over the juvenile. Except in cases in which delinquency is alleged, the petition may contain information on more than one juvenile, when the juveniles are from the same home and are before the court for the same reason. In cases of alleged delinquency, the petitions shall be separate.

A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the accusation.

Sufficient copies of the petition shall be prepared so that copies will be available for each juvenile, for each parent if living separate and apart, for the court counselor or social worker, and for any person determined by the court to be a necessary party. (1979, c. 815, s. 1.)

§7A-565. Service of summons. — The summons shall be personally served upon the parent, the guardian, custodian, or caretaker, and the juvenile or counsel or guardian ad litem, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the judge.

If the parent, guardian, or custodian entitled to receive a summons cannot be found by a diligent effort, the judge may authorize service of the summons and petition by

mail or by publication. The cost of the service by publication shall de advanced by the petitioner and may be charged as court costs as the judge, in his discretion, may direct.

If the parent, guardian, or custodian is personally served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, he may be proceeded against as for contempt of court.

The provisions of G.S. 15A-301(a),(c),(d), and (e) relating to criminal process apply to juvenile pro ss; provided the period of time for return of an unserved summons is 30 days. (1979, c. 815, s. 1.)

§7A-586. Appointment of guardian ad litem. — When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to appear on behalf of the juvenile in the court proceeding and to perform necessary and appropriate legal services on his behalf; to present relevant facts to the judge at the adjudicatory hearing and to explore options with the judge at the dispositional hearing; to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge; and to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals.

The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to appear with the juvenile in any criminal action wherein he may be called on to

testify in a matter relating to abuse.

The guardian ad litem shall be an attorney-at-law, licensed to practice in the State of North Carolina. In no case may the judge appoint a public defender as guardian ad litem. The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge. (1979, c. 815, s. 1.)

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§7A-587. Parent's right to counsel. — In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. (1979, c. 815, s. 1.)

§7A-629. Adjudicatory hearing. — The adjudicatory hearing shall be held in the district at such time and place as the chief district judge shall designate. The judge may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted. (1979, c. 815, s. 1.)

§7A-634. Rules of evidence. — (a) Where delinquent or undisciplined behavior is alleged and the allegation is denied, the court shall proceed in accordance with the rules of evidence applicable to criminal cases. In addition, no statement made by a juvenile to the intake counselor during the preliminary inquiry and evaluation process

shall be admissible against the juvenile prior to the dispositional hearing.

(b) Where the juvenile is alleged to be abused, neglected or dependent, the rules of evidence in civil cases shall apply. (1979, c. 815, s. 1.)

§7A-635. Quantum of proof in adjudicatory hearing. – The allegation of a petition alleging the juvenile is delinquent shall be beyond a reasonable doubt. The allegations in a petition alleging abuse, neglect, dependence, or undisciplined behavior shall be proved by clear and convincing evidence. (1979, c. 815, s. 1.)

§7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile. – The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any two of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

(1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. Any department of social services in whose custody or physical custody a juvenile is placed shall have the authority to arrange for and provide medical care as needed for such juvenile.

(3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county. If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the local mental health, mental retardation, and substance abuse director or local mental health director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile

directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, mental retardation, and substance abuse director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet his needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, or custodian refuses to consent to mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, mental retardation, and substance abuse health director, the signature and consent of the judge may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a judge and an area mental health, mental retardation, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of his treatment, the hospital shall submit to the judge a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question. (1979, c. 815, s. 1.)

ARTICLE 24B

TERMINATION OF PARENTAL RIGHTS

Statutes In Effect At time This Action Was Filed In 1978

§7A-289.22. Legislative intent: construction of Article. — The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interest of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict; and to that end this Article should be liberally construed. (1977, c. 289, s. 8.)

§7A-289.23. Jurisdiction. — The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of

filing of the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. A guardian ad litem shall be appointed to represent such minor parent, under the age of 14 years. (1977, c. 879, s. 8.)

§7A-289.24. Who may petition. — A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or

(2) Any person who has been judicially appointed as the guardian of the person of the child; or

(3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

§7A-289.25. Petition. — The petition shall be verified by the petitioner and shall be entitled "In re (*last name of child*) a minor child"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

(1) The name of the child as it appears on the child's birth certificate, the date on place of

birth, and the county where the child is presently residing.

(2) The name and address of the petitioner and facts sufficient to identify the petitioner as one entitled to petition under G.S. 7A-289.24.

(3) The name and address of the parents of the child. If the name or address of one or both parents is unknown to the petitioner, the petitioner shall set forth with particularity the petitioner's efforts to ascertain the identity or whereabouts of the parent or parents. Such information may be contained in an affidavit attached to the petition and incorporated therein by reference.

(4) The name and address of any person appointed as guardian of the person of the child pursuant to the provisions of Article 1 of Chapter 33 of the General Statutes, or of G.S. 7A-286(7).

(5) The name and address of any person or agency to whom custody of the child has been given by a court of this or any other state; and a copy of such custody order shall be attached to the petition.

(6) Facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist. (1977, c. 879, s. 8.)

§7A-289.26. Preliminary hearing; unknown parent. — (a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner, the court shall within 10 days from the date of filing of the petition, or during the next

term of court in the county where the petitioned is filed if there is no court in said county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the child concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and such parent shall be summoned to appear in accordance with G.S. 7A-289.27.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing; but the court may cause summons to be issued to any person directing him to appear and testify.

(d) If the court is unable to ascertain the name or identify of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the child to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designated the court in which the petition is pending:

(2) Be directed to "the father (mother)(father and mother) of a male (female) child on or about _____ (date) in _____ County _____ (City) (State) respondent";

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);
(4) State that a petition seeking to terminate the parental rights of the respondents has been filed;
(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice, and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j)(9)(c); and
(6) State that the respondent's parental rights to the child will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

§ **7A-289.27. Issuance of summons.** — Except as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued, directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the child;
(2) Any person who has been judicially appointed as guardian of the person of the child;
(3) The custodian of the child appointed by a court of competent jurisdiction;
(4) Any county department of social services or licensed child-placing agency to whom a child has been released by one parent pursuant to G.S. 48-9(a)(1); and
(5) The child, if he or she is 12 years of age or older at the time the petition is filed.

Provided, no summons need be directed to or served upon any parent who has previously surrendered the child to a county department of social services or licensed child-placing agency, nor to any parent who has consented to the adoption of the child by the petitioner. The summons shall notify the respondents to file written answer within 30 days after service of the summons and petition and that if the respondents fail to answer, the petitioner will apply to the court for the relief prayed for in the petition. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j); but the parent of the child shall not be deemed to be under disability even though such parent is a minor. (1977, c. 879, s. 8.)

§ **7A-289.28. Failure of respondents to answer.** — Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within 30 days from the date of first publication if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition. (1977, c. 879, s. 8.)

§ **7A-289.29. Answer of respondents.** — (a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the the name and address of the answering respondents or his or her attorney.

(b) If an answer denies any material allegation of the petition, the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The court shall conduct a special hear-

ing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8.)

§7A-289.30. Adjudicatory hearing on termination. – (a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based upon a preponderance of the evidence. No husband-wife or

physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8.)

§7A-289.31. Disposition. – (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

(b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition, making appropriate findings of fact and conclusions.

(d) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8.)

§7A-289.32. Grounds for terminating parental rights. – The court may terminate the parental rights upon a finding of one or more the following:

(1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare.

(2) The parent has physically abused or neglected the child. The child shall be deemed to be physically

abused or neglected if the court finds the child to be an abused child whithin the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:

a. Established paternity judicially or by affidavit; or
b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
c. Legitimated the child by marriage to the mother of the child; or
d. Provided substantial financial support or consistent care with respect to the child and mother. (1977, c. 879, s. 8.)

§7A-289.33. Effects of termination order. — An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

(1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the child in the custody of the petitioner, or some other suitable person, or in the custody of the Department of Social Services or licensed child-placing agency, as may appear to be in the best interest of the child. (1977, c. 879, s. 8.)

§7A-289.34. Appeals: modification of order after affirmation. — Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. Upon the affirmation of the order of adjudication or disposition of the district court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of such an appeal, the district court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interest of the child to reflect any adjustment made by the child or change in circumstances during the period of time the case on appeal was pending, provided that if such modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why said modifying order should be vacated or altered. (1977, c. 879, s. 8.)

APPENDIX C

The questionnaire sent to each of the one hundred counties on November 7, 1980 is as follows:

Name of County _____

1. What type of legal representation does your agency have?
   (a) _____full time or in house counsel representing agency in all legal matters
   (b) _____representation by counsel only in certain types of matters
      (1) ____child custody proceedings
      (2) ____terminations of parental rights
      (3) ____adult protective services
      (4) ____fraud
      (5) ____child support
      (6) ____administrative matters

2. Has your agency presented any termination of parental rights cases in Court since October 1, 1977, *without* benefit of counsel, and if so, how many?

3. Do your Juvenile Court Judges now appoint counsel to represent indigent parents in termination proceedings by extending the authority to appoint counsel in abuse, neglect and dependency proceedings granted by G.S. §7A-587 of the New Juvenile Code, effective January 1, 1980?

4. How many termination of parental rights cases has your agency successfully presented to the Court since

the effective date of the present termination of parental rights law, October 1, 1977?

(a) In how many of these were the parent or parents represented by counsel?

5. How many termination of parental rights petitions have your Juvenile Court Judges dismissed pursuant to G.S. §7A-289.31(b) as not being in the best interests of the child irrespective of the existence of one or more grounds for termination?

(a) In how many of these were the parent or parents represented by counsel?

6. How many of your termination of parental rights cases have been dismissed pursuant to G.S. §7A-289.31(c) because grounds for termination did not exist?

(a) In how many of these were the parent or parents represented by counsel?

7. Do your Juvenile Court Judges routinely appoint guardians ad litem for the juveniles in termination of parental rights proceedings?

8. If you have any special comments that you feel may be helpful, but not addressed in the answers to the questions above, please elucidate.

For the purposes of discussion of the information received as a result of this questionnaire only the statistics related to questions 2, 4, 4(a), 5, 5(a), 6, and 6(a) are included in the following table.

It should be noted that the information from Gaston, Guilford, and Forsyth counties was provided by telephone rather than in written responses to the questionnaire.

THE INDIVIDUAL RESPONSES OTHER THAN THOSE FROM GUILFORD, GASTON, AND FORSYTH COUNTIES WERE SENT TO COUNSEL FOR THE PETITIONER AND AMICI ON DECEMBER 9, 1980 FOR THEIR USE AND EVALUATION.

COUNTY	Terminations Presented Without Benefit of Counsel To Agency	Successful Termination Cases Presented	In How Many Parents Represented	Terminations Dismissed Irrespective of Grounds	In How Many Parents Represented	Terminations Dismissed For Lack of Grounds	In How Many Parents Represented
Alexander	none	7	2	1	1	0	0
Alleghany	no	1	0	0	0	0	0
Anson	no	0	0	0	0	0	0
Beaufort	no	8	0	1	0	0	0
Bertie	no	4	0	0	0	0	0
Bladen	no	0	0	0	0	0	0
Brunswick	yes (number not reported)	4	0	0	0	0	0
Buncombe	no	19	8	0	0	0	0
Burke	yes (32 cases)	33	4	0	0	0	0
Cabarrus	no	6	3	0	0	0	0
Caswell	no	3	0	0	0	0	0
Catawba	no	22	4	0	0	0	0
Chowan	no	0	0	0	0	0	0
Clay	no	0	0	0	0	0	0
Cleveland	no	2	0	0	0	0	0
Cumberland	no	90	0	0	0	0	0
Currituck	no	0	0	0	0	0	0
Dare	no	2	0	0	0	0	0
Davie	no	1	0	0	0	0	0
Durham	no	16	4	0	0	0	0
Edgecombe	no	11	0	0	0	0	0
Forsyth	no	30	3	0	0	0	0
Gaston	no	24	1	0	0	0	0
Graham	no	0	0	0	0	0	0
Greene	no	0	0	0	0	0	0
Guilford	no	70	24	0	0	0	0
Halifax	no	10	0	0	0	0	0
Harnett	no	7	2	0	0	0	0
Haywood	no	0	0	0	0	0	0

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COUNTY	Terminations Presented Without Benefit of Counsel To Agency	Successful Termination Cases Presented	In How Many Parents Represented	Terminations Dismissed Irrespective of Grounds	In How Many Parents Represented	Terminations Dismissed For Lack of Grounds	In How Many Parents Represented
Hertford	no	1	1	0	0	0	0
Hoke	no	0	0	0	0	0	0
Hyde	no	0	0	0	0	0	0
Jackson	no	0	0	0	0	0	0
Jones	no	0	0	0	0	0	0
Lee	no	4	4	0	0	0	0
Lenoir	no	2	0	0	0	0	0
Macon	no	0	0	0	0	0	0
Madison	no	4	1	0	0	0	0
Martin	yes (2 cases)	11	0	0	0	0	0
McDowell	no	4	0	0	0	0	0
Mecklenburg	no	123	19*	2	2	1	1
Mitchell	no	1	0	0	0	0	0
Montgomery	no	2	0	0	0	0	0
Moore	no	7	0	0	0	0	0
Nash	no	14	0	0	0	0	0
New Hanover	no	4	0	0	0	0	0
Northampton	no	0	0	0	0	0	0
Pamlico	no	0	0	0	0	0	0
Passquotank	no	0	0	0	0	0	0
Perquimans	no	0	0	0	0	0	0
Person	no	2	0	0	0	0	0
Pitt	no	8	0	0	0	0	0
Randolph	no	16	0	0	0	0	0
Richmond	no	5	1	0	0	0	0
Robeson	no	16	0	0	0	0	0

* Mecklenburg reported that in 10-15% of the cases the parents were represented. This per cent figure is commensurate with the figure (16%) computed on the basis of actual numbers reported by the remaining counties. Therefore, the number 19 reflects 15% of all cases reported in Mecklenburg County.

COUNTY	Terminations Presented Without Benefit of Counsel To Agency	Successful Termination Cases Presented	In How Many Parents Represented	Terminations Dismissed Irrespective of Grounds	In How Many Parents Represented	Terminations Dismissed For Lack of Grounds	In How Many Parents Represented
Rockingham	yes (4 cases)	26	4	1	1	0	0
Rowan	no	40	15	0	0	0	0
Rutherford	no	6	1	0	0	0	0
Sampson	no	15	0	0	0	1	1
Scotland	no	11	2	0	0	0	0
Stanly	no	1	0	0	0	0	0
Stokes	no	0	0	0	0	0	0
Surry	no	1	0	0	0	0	0
Swain	no	0	0	0	0	0	0
Transylvania	no	7	4	0	0	0	0
Union	no	4	4	1	1	0	0
Vance	no	0	0	0	0	0	0
Wake	no	18	1	0	0	0	0
Washington	no	1	1	0	0	0	0
Watauga	no	16	4	0	0	0	0
Wayne	no	12	3	0	0	0	0
Wilson	no	4	0	0	0	0	0
Yadkin	yes (4 cases)	4	0	0	0	0	0
TOTALS		760	120	6	5	2	2